INDEX.

PAGE

Statement and Petition 1

Basis of Appeal 2

Scope of State's Brief 3

POINT I—Chapter 781 of the Laws of 1933 of the State of New York (State Recovery Act) constitutes a valid exercise of the State's legislative function ... 5

A—The Emergency 5

B—The State Recovery Act—Its Principles and Purposes 7

C—The Necessity and Reasonableness of the Regulations Attacked 11

D—The Propriety of Delegating Powers to Administrative Agencies 16

E—Reciprocal and Mutual Acceptance of State and Federal Agencies 22

F—Section 17, Article III of the State Constitution 37

Conclusion 40

Appendix A, Chapter 781 of the Laws of New York State, 1933 41

Appendix B, Chapter 783 of the Laws of New York State, 1933 46

TABLE OF CASES CITED:

	PAGE
Appalachian Coals, Inc. v. *U. S.*, 288 U. S. 344	7
Arizona Employers' Liability Cases, 250 U. S. 400	14
Atchison, Topeka & Santa Fe R. R. Co. v. *U. S.*, 284 U. S. 248, 260	7
Arent v. *U. S.*, 266 U. S. 127	37
Arver v. *U. S.*, 245 U. S. 366, at 389	30
Brooks v. *United States*, 267 U. S. 432	25
Brown v. *State*, 323 Mo. 138	31
Bunting v. *Oregon*, 243 U. S. 426	14, 15
Central Lumber Company v. *South Dakota*, 226 U. S. 157	15
Clark Distilling Co. v. *Western Maryland Railroad*, 242 U. S. 311	24, 26, 27, 28, 37
Cleveland v. *City of Watertown*, 222 N. Y. 159	21
Eubank v. *Richmond*, 226 U. S. 137, 142	16
Ex Parte Burke, 190 Cal. 326	24
Florida v. *Mellon*, 273 U. S. 12	31
Gardner v. *Ginther*, 232 App. Div. 296, aff'd 257 N. Y. 578	21
Gibbons v. *Ogden*, 9 Wheat. 1, 206	23
Gilbert v. *Minnesota*, 254 U. S. 325	24
Gima v. *Hudson Coal Co.*, 310 Pa. 480	33
Hagood v. *Doughton*, 195 N. C. 811	31
Halter v. *Nebraska*, 205 U. S. 34	24
Hippolite Egg Co. v. *United States*, 220 U. S. 45	14
Holden v. *Hardy*, 169 U. S. 366	15
Holmgren v. *U. S.*, 217 U. S. 509	30
Home Ins. Co. v. *Swegert*, 104 Ill. 653	31
Home Building and Loan Association v. *Blaisdell*, 290 U. S. 398	6, 7
In re Rahrer, 140 U. S. 545	24

PAGE

Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149..., 28, 35
Knoxville Iron Co. v. *Harbison*, 183 U. S. 13..... 14

Lawton v. *Steele*, 152 U. S. 133..... 14
Liggett Co. v. *Lee*, 288 U. S. 517..... 4
Louisville and Nashville R. Co. v. *Garrett*, 231 U. S. 298, 304..... 4

Matter of College of City of New York v. *Hylan*, 205 App. Div. 372, aff'd 236 N. Y. 594..... 20
Matter of Gilbert Elevated Railway Co., 70 N. Y. 361.. 20
Matter of National Surety Co., 239 App. Div. 490.... 21
McLean v. *Arkansas*, 211 U. S. 539..... 14
Miller v. *Wilson*, 236 U. S. 373..... 14
Mintz v. *Baldwin*, 289 U. S. 346..... 37
Minneapolis & St. Louis R. R. Co. v. *Bonbolis*, 241 U. S. 211.....L..... 23
Mountain Timber Co. v. *Washington*, 243 U. S. 219.... 14
Muller v. *Oregon*, 208 U. S. 412..... 14

Northern Securities Company v. *United States*, 193 U. S. 197, 332..... 15
New York Central Railroad v. *White*, 243 U. S. 188... 14
Nebbia v. *The People of the State of New York*, 291 U. S. 502.....12, 13, 14, 37

Panama Refining Co. et al. v. *Ryan et al.*, 293 U. S. , decided Jan. 7, 1935..... 4
People v. *Davis*, 78 App. Div. 570..... 38
People v. *Dempsey*, 224 N. Y. 140..... 37
People ex rel. Durham Realty Corp. v. *LaFetra*, 230 N. Y. 429, 443..... 7
People v. *Fire Assn. of Phila.*, 92 N. Y. 311, aff'd 119 U. S. 110.....32, 36
People v. *Goldfogel*, 242 N. Y. 277..... 31
Phoenix Ins. Co. v. *Welch*, 29 Kan. 672..... 32
People v. *Long Island Railroad Co.*, 134 N. Y. 506..... 20
People v. *L. I. R. R. Co.*, 134 N. Y. 506..... 37

PAGE

People v. *Moynihan*, 121 Misc. 34..... 21
Polinsky v. *People*, 73 N. Y. 65..... 37
People ex rel. Commissioners v. *Banks*, 67 N. Y. 568.. 39
People ex rel. Doscher v. *Sisson*, 222 N. Y. 387.....20, 21
People ex rel. Emerson v. *Lorillard*, 135 N. Y. 285.... 39
People ex rel. N. Y. Electric Lines v. *Squire*, 107 N. Y. 593, 602 39

Radice v. *New York*, 264 U. S. 292..... 15
Rast v. *Van Deman and Lewis*, 240 U. S. 342..... 15

Schmidinger v. *Chicago*, 226 U. S. 578..... 14
Second Employer's Liability cases, 223 U. S. 1..... 23
Smiley v. *Kansas*, 196 U. S. 447..... 15
Stettler v. *O'Hara*, 69 Oreg. 519..... 15
Sturges v. *Beauchamp*, 231 U. S. 320.....14, 15
Swetland v. *Curtis Airports*, 41 Fed. (2d) 929, injunction modified 55 Fed. (2nd) 201..... 30

Texas Co. v. *Dickinson*, 79 N. J. L. 292..... 32
Tox v. *Ohio*, 5 How. 410, 434..... 24

U. S. v. *Grimaud*, 220 U. S. 506..... 37
U. S. v. *Hill*, 248 U. S. 420..... 29
Underwood Typewriter v. *Chamberlain*, 94 Conn. 47, aff'd 254 U. S. 113 31
United States v. *40 Barrels and 20 Kegs of Coca-Cola*, 241 U. S. 265..... 14
United States v. *Johnson*, 221 U. S. 488..... 14

Village of Saratoga Springs v. *Saratoga Gas, Electric Light & Power Co.*, 191 N. Y. 123.....19, 20

Watkinson v. *Hotel Pennsylvania*, 195 App. Div. 624, aff'd 231 N. Y. 562.....31, 38
Wilson v. *New*, 243 U. S. 332..... 15

OTHER AUTHORITIES CITED:

	PAGE
United States Code, Title 28, Section 380	1
Laws of the State of New York, 1933, Chapter 781,	
1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 19, 22, 32, 33, 34, 35, 39, 40, 41	
Section 1	7, 17
Section 2	17, 37
Section 3	9
Section 4	9
National Industrial Recovery Act, Title 15, United States Code, 48 Stat. 195,	
2, 3, 6, 7, 8, 9, 10, 16, 18, 19, 22, 33, 34, 38, 39	
Section 2a	10
Section 3a	17, 18, 37
Section 7a	18
Section 10b	18
Motor Vehicle Retailing Code	2, 3
Article IV,	
Subdivision A	2
Subdivision B, paras. 1 and 2	2
Constitution of the State of New York	3, 5, 15
Article III, Section 17	5, 37, 38, 39
Article III, Section 1	16, 17, 38
Constitution of the United States	3, 5
Fifth Amendment	5
Fourteenth Amendment	5, 15
Article I, Section 1	16
Eighteenth Amendment	24, 25
Laws of the State of New York, 1933, Chapter 783	9, 46
Webb-Kenyon Act	24, 26, 29
Wilson Act	24
34 Columbia L. R. 1077, 1080-1081	37
Laws of the State of New York, 1928, Chapter 233	30

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 567.

SPIELMAN MOTOR SALES CO. INC.,
Complainant-Appellant,

vs.

WILLIAM C. DODGE, as District Attorney of New York County, State of New York,
Defendant-Appellee.

BRIEF ON BEHALF OF STATE OF NEW YORK.

Statement and Petition.

The State of New York, in the persons of the Attorney General and the Governor, were served with the Bill of Complaint, orders and other papers in the within proceeding and became parties thereto pursuant to Title 28, Section 380, of the United States Code. The plaintiff (appellant herein) attacks the validity of a state statute (Ch. 781, Laws of 1933 of New York) under the State Constitution (R., pp. 3-5).

Now comes the State of New York, by its Attorney General, John J. Bennett, Jr., Henry Epstein, Solicitor General, Solicitors, and asks leave to be deemed a party to the instant appeal and to submit the subjoined memorandum in support of the constitutional validity of Chapter 781, Laws of 1933, of New York State.

March 6, 1935.

JOHN J. BENNETT, JR.,
Attorney General,

HENRY EPSTEIN,
Solicitor General,
For State of New York, Appellee.

Basis of Appeal.

Appellant is a retail automobile dealer, selling the product of the Chevrolet Motor Company, a branch of the General Motors Corporation (R., pp. 4-5). The National Industrial Recovery Act (Title 15, United States Code; 48 Stat. 195), authorizes the creation of Codes of Fair Competition in the various industries and trades of the nation. Pursuant thereto, the Motor Vehicle Retailing Trade adopted such a code (R., p. 16) which was affirmed by the National Industrial Administrator and by the President of the United States (Oct. 3, 1933). By reason thereof it became effective as to interstate transactions in this trade.

New York State, by Chapter 781, Laws of 1933, enacted a State "Recovery Act" whereby the said code was available as the standard of fair competition in respect of intrastate retail sales of automobiles within New York State. The code became effective in New York State upon the filing of a certified copy with the Secretary of State, Dec. 3, 1933 (R., p. 33).

By reason of Article IV, subdivision A, and Article IV, subdivision B, paragraphs 1 and 2, of the said Motor Vehicle Retailing Trade Code, dealers selling new cars are prohibited from allowing more than an established maximum allowance for an old car traded-in as part payment for the new car purchased. The provisions for the sale of said new cars at list prices, plus certain fixed charges, and the prohibitions against rebates, gratuities and the like, are all related to the basic "trade-in" allowance question (R., p. 16).

Appellant seeks to sell new automobiles in New York State in violation of said provisions of the code,

contending that they are violative of its privileges under the Federal and State Constitutions, that they violate the National Industrial Recovery Act itself, that the said act is violative of the Federal Constitution, and that the State Act (Ch. 781, L. 1933) is violative of the State Constitution. The within action was brought to enjoin a threatened prosecution by the District Attorney of New York County under the State Act.

Scope of State's Brief.

The brief of appellee Dodge, District Attorney of New York County, will deal with the factual background leading to the enactment of the National Industrial Recovery Act, the necessity for stringent regulation of the retail automobile industry, as an integral and important phase of the automotive industry, and will discuss at length the position of the National Industrial Recovery Act and the Motor Vehicle Retailing Trade Code in relation to the Federal Constitution.

The following discussion will assume as its premise the constitutional validity of the National Industrial Recovery Act and the code approved pursuant thereto, in respect of *interstate and foreign commerce,* under the Constitution of the United States. On the basis of such assumption it will be herein argued that the State Recovery Act is a valid enactment under the Constitution of the State of New York.

This court may well withhold a determination of the validity of a state act under a state constitution when the issues could have been litigated in the state

courts and where such issue is now in other litigation pending.[1]

The appellant urges that the State Act is contrary to the provisions of the State Constitution. This court, while affirming the principle that enforcement of invalid statutes may be restrained (*Panama Refining Co. et al.* v. *Ryan, et al.*, 293 U. S. , decided Jan. 7, 1935), has also declared its reluctance to adjudge a state statute to be in conflict with the Constitution of the State before the question has been considered by the highest tribunal of the state—unless the case imperatively demands such a decision (*Louisville and Nashville R. Co.* v. *Garrett*, 231 U. S. 298, 304; *Liggett Co.* v. *Lee*, 288 U. S. 517). No such determination by the Court of Appeals of New York has as yet been made on the questions here involved.

There is present in the instant case no such urgent necessity as evidently prevailed in the *Louisville and Nashville R. R.* case (*supra*) to overcome lack of conclusive decisions in the state court. The findings indicate no such situation. No claim is made of compelling emergency. Generally such determination should be left within the jurisdiction of the highest state tribunal. The prospect or even possibility of a decision in the highest state court contra to that of this court on a state question should dictate circumspection in the interest of orderly judicial processes.

---

[1] *Sherman* v. *Abeles*, 241 App. Div. (N. Y.) 676—affirmed the lower court and sustained the State Recovery Act (150 Misc. 497). Reversed on other grounds, the Court of Appeals not deciding the issue of the validity of the State Act, 265 N. Y. 383. *Matter of Sabatini* v. *Andrews*, Appellate Division, First Department, sustained State Act 243 App. Div. 109, opinion by Glennon, *J.*—Now pending before Court of Appeals—March Term. *Darweger* v. *Staats, et al.*, 153 Misc. 522;—lower court denied the validity of the State Act; affirmed by Appellate Division, Third Department (March 5, 1935)—arrangements made to present the appeal to the Court of Appeals on or before March 15th. *Gross* v. *Jamaica Auction Galleries*—Appellate Division, Second Department (273 N. Y. S. 376) reversed an order denying injunction and directed injunctive relief to restrain code violation.

Added weight is given to this suggestion in the adequate number of cases decided in the state appellate courts in favor of the propriety of the State Recovery Act. It is, therefore, respectfully urged that no determination be made, or consideration given by this court to the local question presented by appellant.

In the event, however, that this court sees fit to decide the state question of constitutionality under the state fundamental law, the following arguments are presented for the court's consideration.

POINT I.

Chapter 781 of the Laws of 1933 of the State of New York (State Recovery Act) constitutes a valid exercise of the State's legislative function.

The appellant urges that the State Act is contrary to the Constitution of the State of New York in two respects:—first, that the Act constitutes an improper delegation of legislative power; second, that it violates Article III, Section 17, of the State Constitution, which prohibits the incorporation by reference of an existing law. These contentions will be dealt with in this point.

Appellant's argument that the regulation of trade-in allowance values is violative of the Fifth and Fourteenth Amendments to the Constitution of the United States is dealt with fully in the brief of appellee Dodge, and therefore will be treated only incidentally in this brief.

A. The Emergency.

Chapter 781 of the Laws of 1933 became effective on August 26th, 1933, some two months after the

adoption of the National Industrial Recovery Act. Both laws were enacted during a period of grave economic crisis, with which both the Nation and the State were confronted. This critical condition called for the fullest exercise of the powers of the Federal and State Governments, in cooperation with each other and in cooperation with industry.

The effect of the emergency upon questions of constitutional limitations has recently been clarified by this court in *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398. The doctrine reiterated in that case is to the effect that, although emergency does not call into existence any powers which the Constitution does not grant, the emergency does afford an occasion for a wider use of the powers which the Federal and State Governments already enjoy.

No one questions the existence of the power in the states to regulate business enterprises and contracts in such respects as the public welfare requires. No one will take issue with the finding of the New York Legislature that a state wide emergency existed which seriously threatened the welfare of the state. In the face of a critical emergency, which has caused widespread unemployment, grave distress, and the prostration of industrial enterprise throughout the state, there is no question that the state may exercise its conceded powers to an extent which normal conditions would not justify. In such a situation "either the rights of property and contract must * * * yield to the public convenience, advantage and welfare, or it must be found that the state has surrendered one of the attributes of sovereignty for which governments are founded and made itself powerless to secure to its

citizens the blessings of freedom and to promote the general welfare." *People ex rel. Durham Realty Corp.* v. *LaFetra*, 230 N. Y. 429, 443.

As was said by Chief Justice Hughes in *Home Building and Loan Association* v. *Blaisdell* (*supra*, at p. 439):

> "If state power exists to give temporary relief, from the enforcement of contracts in the presence of disasters due to physical causes, such as fire, flood or earthquake, that power cannot be said to be non-existent when the urgent public need demanding such relief is produced by other and economic causes."

This Court has already had occasion to take judicial notice of the critical conditions brought about by the present depression (*Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344; *Atchison, Topeka & Santa Fe R. R. Co.* v. *U. S.*, 284 U. S. 248, 260). The urgent public need which occasioned the passage of both the National and State Recovery Acts is too clear for argument. The wisdom of these measures is not a matter for determination by the courts.

B. The State Recovery Act—Its Principles and Purposes.

The State Recovery Act (Ch. 781, Laws of 1933) was passed at a special session of the Legislature in 1933 (see Appendix A for full text of the statute). The Legislative intent is clearly shown in the body of the law itself. Section 1 contains a most significant declaration of Legislative finding of fact and of policy:

"Section 1. *Legislative finding; statement*

of policy. A national emergency productive of widespread unemployment and disorganization of industry, which likewise prevails in the state of New York, which burdens intrastate, interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people and of the people of the state of New York, is hereby declared to exist. The existence in this state of such present acute economic emergency, and the effects and certain causes thereof as declared in section one of title one of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred thirty-three, are hereby recognized; and it is hereby declared that said emergency, the causes and effects thereof, as so declared, relate as well to commerce in this state wholly intrastate in character as to interstate and foreign commerce and transactions affecting interstate and foreign commerce carried on in this state. It is hereby declared to be the policy of this state to cooperate in the furtherance of the objects and purposes declared in said act of the congress, and each and every provision of this act shall be construed in accordance with the policy so declared, and to make uniform the standards of fair competition prevailing in intrastate commerce and industry with those of interstate commerce required by the provisions of the said national industrial recovery act which are applicable in interstate commerce in the state of New York."

The New York Act thus declares the existence of a national emergency in the precise language of the National Industrial Recovery Act itself, and contains,

in addition, the finding that the emergency likewise exists in this state and affects the welfare and undermines the standards of living of the people of the State of New York. There is also the finding that the emergency and the causes and effects thereof, as declared in the National Act, relate as well to commerce in this state wholly intrastate in character.

The Legislature then declares the policy of this state (1) to cooperate in the furtherance of the objects and the purposes declared in the National Act; and (2) to make uniform the standards of fair competition prevailing in intrastate commerce with the applicable standards of interstate commerce provided for in the National Act.

Section 2 authorizes the Secretary of State to file certified copies of codes, agreements, rules and regulations adopted pursuant to the National Act, and provides, upon the filing of any such codes, its provisions shall be "the standard of fair competition for such trade or industry or subdivision thereof in the state as to transactions intrastate in character". The violation of any provision of any code, agreement, rule or regulation so filed is made a misdemeanor punishable by a fine of $500.

Section 3 of the New York Act vests the Supreme Court of the State of New York with jurisdiction to restrain the violations of any codes filed pursuant to Section 2.

Section 4 of the New York Act suspends the operation of the state anti-trust laws during the time that the act is in effect. The New York Act, by its terms, becomes ineffective contemporaneously with the expiration of the National Industrial Recovery Act.

On the same day that Chapter 781 became effective, Chapter 783 of the Laws of 1933 also became a law

of this State. By this Chapter, the State consented to the utilization of its own officers by the President in the effectuation of the purposes of the National Industrial Recovery Act (see Appendix B). This Chapter constituted complementary legislation to Section 2a of the National Act, which contemplates the utilization by the Federal Government of state and local officers with the consent of the states.

Analysis of these enactments makes it clear that the Legislature intended, in a period of critical emergency, to offer the fullest cooperation possible to the Federal Government in the achievement of the purposes of the National Industrial Recovery Act. The Legislature unquestionably desired that this State should do all within its powers to bring about the correction of economic conditions in trade and industry, within the state, which the Federal Government was seeking to realize through the National Act.

The New York Act, adopted some two months after the Federal Act, recognized the fact that codes were being prepared and adopted pursuant to the National Industrial Recovery Act and in accordance with the conditions and limitations therein imposed. It manifests an intention on the part of the Legislature to take advantage of the extensive administrative machinery which had already been established under the Federal Act. For the sake of uniformity in interstate and intrastate commerce, it adopted the Federal standard and the results of the administrative action contemplated by the National Act. Instead of setting up administrative agencies of its own, it adopted the policy of coordinating its activities with the procedural formula set up by the Federal Government. It provided that that procedural process should come into operation with respect to any given industry

upon the filing of a certified copy of the National Code for that industry in this State. Upon such filing, the agencies set up by the Federal Government to administer the code in interstate matters thereupon became the administrative agencies of the state to administer the code in intrastate matters.

The system was simple. It insured perfect harmony in coordinating the activities of both governments. It was the most effective way of attaining the purpose of the New York Act to make uniform the standards of fair competition.

Thus, the combined powers of the National and State government were harnessed in an attempt to alleviate the critical conditions which existed.

C. The Necessity and Reasonableness of the Regulations Attacked.

The principal regulations undertaken under codes of fair competition have been the establishment of minimum wages, maximum hours of employment, and the definition and proscription of unfair competitive practices which have been one of the basic causes of the disorganized condition in the several industries.

The particular regulation attacked in this case as violative of due process is the trade-in allowance provision of the code. The Court below found that the granting of excessive trade-in allowances in the sale of new automobiles far in excess of their actual resale value was the most serious and most destructive competitive practice in this trade. It found that eighty-five per cent. of all sales made by new car dealers are based on trade-in allowances on used cars and that the economic depression had so intensified and inflamed this destructive competitive practice that it had brought the industry to the point where it was

threatened with extinction and bankruptcy. In addition, the result of this particular method of unfair competition was to disorganize and disrupt the entire industry and to cause a sharp and drastic reduction of its wage and labor standards (Findings 24-37, Supplemental Record, pp. 18-19). The reasonableness of the regulation itself has been reviewed at length in the brief of appellee DODGE. In that brief also is to be found an exhaustive analysis of the relationship of this regulation to the problem of due process. It will be necessary here to discuss only very briefly the question of the power of the state to enforce this regulation and other forms of regulations adopted in the various codes and made effective by reason of the State Recovery Act.

The State of New York has adopted these codes under its own industrial recovery act. It has made these regulations under what is commonly known as its police power—the power which the Supreme Court has said is "the power to promote the general welfare" which "is inherent in government". It is, said the court, "the power of sovereignty, *the power to govern men and things within its own limits*".

Any doubt which may have existed that this power of sovereign states is not as broad as the exigencies which face them has been put to rest by the case of *Nebbia* v. *The People of the State of New York*, 291 U. S. 502. A statute passed by the State of New York was there upheld, which, among other things, fixed the retail price of milk and made the sale at different prices a criminal offense. The opinion of this court is so comprehensive and well-considered that it disposes of every argument made by the appellant on the question of due process.

This court reached the following conclusions:

1. *That no business or property right is immune from government regulation.* The government may prevent an individual from using his property to the detriment of his fellows and keep him from using his freedom of contract to work his fellows harm. Equally fundamental with the private right over property and enterprise is that of the public to regulate it in the common interest.

2. *That a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare and to enforce that policy by legislation adopted to its purpose.* The courts are without authority either to declare such policy, or when declared by the Legislature to override it. If the laws passed can be said to have a reasonable relation to a proper legislative purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied.

3. *That no kind of business is immune from regulation by the state in the public interest.* No type of competitive practice within any industry is guaranteed against interference by the state when its evils in the opinion of the Legislature require that it be curbed.

The particular "economic maladjustment" which the Legislature regulated and which was upheld in the *Nebbia* case was that of price, but this court has upheld a wide variety of legislation enacted to deal with other evils which had arisen out of business enterprises and which public interests demanded be regulated. The wide scope of the regulatory power

of a state or the national government is indicated by the variety of statutes which have been upheld by the Supreme Court providing for the prohibition of child labor (*Sturges* v. *Beauchamp*, 231 U. S. 320), imposing restrictions upon hours of labor for adults (*Muller* v. *Oregon*, 208 U. S. 412); (*Miller* v. *Wilson*, 236 U. S. 373; *Bunting* v. *Oregon*, 243 U. S. 426), prescribing the form and actual amount of payment of wages to employees (*Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13), determining the time and manner of payment of minors (*McLean* v. *Arkansas*, 211 U. S. 539), fixing the size of a loaf of bread (*Schmidinger* v. *Chicago*, 226 U. S. 578), determining the compensation insurance for laborers injured by industrial accidents (*New York Central Railroad* v. *White*, 243 U. S. 188; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *Arizona Employers' Liability Cases*, 250 U. S. 400) fixing the standard of quality of wares offered for sale (*Hippolite Egg Co.* v. *United States*, 220 U. S. 45; *United States* v. *40 Barrels and 20 Kegs of Coca-Cola*, 241 U. S. 265; *United States* v. *Johnson*, 221 U. S. 488; *Lawton* v. *Steele*, 152 U. S. 133).

In footnotes 24, 25 and 26 in the majority opinion in the *Nebbia* case will be found other cases upholding laws passed in the public interest which curtail property rights and place restrictions upon the freedom of contract.

Practically every type of regulation attempted under the Codes has been upheld at some time as within the scope of the police power of the states.

In the field of competitive practices the courts have sustained *legislation against the charge of lower prices in one locality than those exacted in another;*

Central Lumber Company v. *South Dakota*, 226 U. S. 157; prohibiting the *giving of trade inducements to purchasers or other types of price discrimination. Rast* v. *Van Deman and Lewis*, 240 U. S. 342. Types of *business combinations which ran counter to the declared economic policy of the Government have been validly proscribed under state and federal laws. Smiley* v. *Kansas*, 196 U. S. 447; *Northern Securities Company* v. *United States*, 193 U. S. 197, 332.

In the field of relations between employers and employees the public interest has likewise been recognized as justifying a variety of regulations. The courts have affirmed the power to limit hours of labor, *Holden* v. *Hardy*, 169 U. S. 366; *Bunting* v. *Oregon*, 243 U. S. 426; *Radice* v. *New York*, 264 U. S. 292; to prevent child labor, *Sturges* v. *Beauchamp*, 231 U. S. 320; to fix minimum wages, *Stettler* v. *O'Hara*, 69 Oreg. 519. See also *Wilson* v. *New*, 243 U. S. 332 sustaining a congressional law fixing wages and hours of labor on railroads.

The New York Constitution has no more stringent requirements for "due process" than the Fourteenth Amendment to the Federal Constitution or the similar limitations in other state constitutions. In general it requires that no one be deprived of personal property rights except by means and procedure reasonably adapted to the nature of the case.

The police power of the State of New York is no less broad than that of all proper governments. It embraces the whole system of internal regulation by which the state may subject persons and property to all necessary kinds of reasonable restraints and burdens in order to secure the general comfort, health and prosperity of the state. When the greater public interest requires it the property rights or liberty of

an individual may be restrained or taken away, even without compensation. No business or activity is beyond its reach when the public welfare becomes intimately concerned with it.

The error of assuming that the police power is limited to the objectives of health, morals and safety must be avoided.

> "It (police power) extends, as we have said, not only to regulations which promote the public health, morals and safety *but to those which promote the public convenience or the general prosperity*" (*Eubank* v. *Richmond*, 226 U. S. 137, 142). (Italics ours.)

D. THE PROPRIETY OF DELEGATING POWERS TO ADMINISTRATIVE AGENCIES.

Article III of Section 1 of the State Constitution provides:

> "*Section 1. Legislative Power.* The legislative power of this state shall be vested in the Senate and Assembly."

There is no essential difference between this organic precept and Article I, Section 1 of the Constitution of the United States, which provides:

> "Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The constitutional mandate being almost identical, the same test would be applied in the case of both laws. If the National Act is found to contain no improper delegation of power to the President—a point

fully argued in the brief of appellee Dodge—the State Act will equally withstand any attack on the ground that it is violative of Section 1 of Article III of the State Constitution.

Section 1 of the State Act, after the finding of emergency and the causes thereof, contains the explicit statements that it is "the policy of this State to cooperate in the furtherance of the objects and purposes declared in said act of the congress and each and every provision of this act shall be construed in accordance with the policy so declared, and to make uniform the standards of fair competition prevailing in intrastate commerce and industries * * *".

While this definite statement of policy furnishes a standard and intelligible principle for the designated administrative agent, it is further clarified and limited by the requirement that the standards announced in Section 3a of the National Act must be conformed to. Section 2 of the State Act contains this express proviso:

> "Filing of Codes and Agreement.—1. The Secretary of State is hereby authorized to receive for filing and shall file in the office of the department of state a copy of each Code, agreement, license, rule or regulation *in effect* pursuant to such act of the congress; * * *. Upon such filing of a copy so certified of a Code of Fair Competition for any trade, industry or subdivision thereof, *as approved by the President of the United States,* or of any agreement or license or any rule or regulation provided for under title one of the said national industrial recovery act, such code, agreement, license, rule or regulation shall be the standard of fair competition for such trade or industry or sub-

division thereof in the state as to transactions intrastate in character, * * *."

There is, therefore, specific reference to the approval of the President of the United States under the limitations and conditions imposed upon him by the National Act. The substance of this provision, when combined with the statement of policy contained in Section 1, leads to the necessary conclusion that the Legislature of New York has made it a condition to the effectiveness of a code in intrastate commerce that its terms comply with the limitations set forth in the National Act. The right of the President to approve a code under the National Act is conditioned upon his compliance with the requirements of Section 3a particularly and with Sections 7a and 10b of that statute. A code could not be "in effect pursuant to such act of Congress" unless it met the conditions specified in Section 3a, including the making of definite findings by the President.

The intention of the Legislature was clearly expressed in the statute. It sought to prescribe, in order to obtain uniformity, the same details of fair competition as those included in the National Act. Such uniformity could not be achieved without assuming as a condition the limitations upon the right to approve and formulate codes contained in the National Act.

Passing for the moment the appellant's argument that the state legislature cannot delegate any powers to an administrative tribunal of another sovereignty, there can be no doubt that the regulations contained in the codes approved by the national administration must conform to prescribed standards, limitations and conditions before they can become effective in intrastate transactions. If the National Act is held

to set up adequate standards or limitations to presidential action, the State Act is equally valid.

The validity of the National Act as a proper delegation of legislative authority to the President has been, we believe, fully sustained by the decisions of this Court reviewed in the brief of appellee DODGE. Duplication of that argument is unnecessary. That analysis and the authorities cited therein equally sustain the validity of the State Act as a proper delegation.

The Court of Appeals of New York has also had frequent occasion to pass upon this question. These decisions equally sustain the validity of the State Act.

The leading authority in New York is the case of *Village of Saratoga Springs* v. *Saratoga Gas, Electric Light & Power Co.*, 191 N. Y. 123. This case involved the validity of the delegation of power to the Public Service Commission to fix minimum rates. The court held that the common law rule that a rate be reasonable would necessarily be implied even without special mention in the statute. It laid down the general rule in the following language (p. 144):

> "* * * While no consideration of convenience or of supposed necessity would justify us in ignoring any constitutional mandate or limitation, it must be remembered that we have no express constitutional provision on the subject, and that it is sought to condemn the legislation before us solely by extending the principle that the legislature cannot delegate legislative powers (a principle which, though unquestionably true, is, as we have seen, true only within limits) to a point that would render efficient legislation on the subject impracticable. It cannot be said, to use the language of Jus-

> tice HARLAN, that in any real sense the legislature has delegated its power to the commission. The statute is complete. The legislature, not the commission, has enacted that there shall be maximum rates for the charges of the gas and electric light companies, that light shall be furnished to consumers at those rates, and has provided the penalty for extorting greater charges for service. What is intrusted to the commission is the duty of investigating the facts, and, after a public hearing, of ascertaining and determining what is a reasonable maximum rate. I cannot see how the duty intrusted to the commission in this case differs in principle from that imposed on the president to determine that duties were reciprocally unequal or on the secretary of the treasury to determine what was inferior tea."

The rule is sustained by numerous authorities both before and after the decision of the Court of Appeals in the *Saratoga* case. Thus, in *People* v. *Long Island Railroad Co.*, 134 N. Y. 506, a statute empowering the Supreme Court or the County Court to order that gates be erected at the intersection of a railroad and a street was upheld; in *Matter of Gilbert Elevated Railway Co.*, 70 N. Y. 361, the right of the Rapid Transit Commissioners to designate the streets upon which the road was to be built was sustained; in *People ex rel. Doscher* v. *Sisson*, 222 N. Y. 387, the Court of Appeals upheld a statute giving the state excise commissioner power to suspend the sale of alcoholic beverages, in proximity to camps and munitions factories, during the World War; in *Matter of College of City of New York* v. *Hylan*, 205 App. Div. 372, aff'd 236 N. Y. 594, a statute providing that the trustees of certain colleges

in the City of New York should adopt schedules of compensation to be paid to teachers and employees and that the board of estimate and apportionment should pay such salaries out of tax monies was sustained; in *Cleveland* v. *City of Watertown,* 222 N. Y. 159, the Court of Appeals held that where the legislature provided certain forms of simplified government by statute and permitted any city of the second or third class to adopt any one of such forms, such a statute was not an improper delegation of legislative power; in *People* v. *Moynihan,* 121 Misc. 34, the court held that a statute giving the State Fuel Administrator power to regulate the use of fuel during the World War was not an improper delegation of legislative powers; in *Gardner* v. *Ginther,* 232 App. Div. 296, aff'd 257 N. Y. 578, the power given by the legislature to the Commissioner of Education to lay out school districts was sustained as being not an improper delegation of authority; and in the recent case of *Matter of National Surety Co.,* 239 App. Div. 490, the court sustained the power of the Superintendent of Insurance in carrying out the authority given him by the legislature to rehabilitate an insurance company.

A recent statement of the rule was made by the Court of Appeals in the case of *People ex rel. Doscher* v. *Sisson,* cited *supra.* There the court said at page 397:

> "* * * The legislature may validly appoint an executive agency to examine into and determine whether or not the facts existing warrant, as provided by the legislature, the operation or a suspension of the operation of a statute. The legislature, in the instant case, enacted

> on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to an executive agency the duty of bringing about the result it desired."

Examples of the delegation of legislative power, arising as they do as a result of the complexities of modern life, might be cited almost indefinitely. The exercise of this power in relation to the activities of Civil Service Commissions, Public Service Commissions, Boards of Education, Boards of Health, the Milk Control Board and similar administrative agencies is of such common knowledge that it is taken as a matter of course. The board or commission to make effective the standard set by the legislature is a necessity of modern life.

Both under the decisions of this Court and the State Court, the State Recovery Act contains adequate standards and limitations of power. Both the Federal and the State acts have the same legislative purpose. The codes are the rules and regulations which fill in the details of the statutes in accordance with the "primary standards" laid down by the legislative bodies. Both statutes do no more than to delegate the power to make the rules and regulations within prescribed limitations to administrative agencies. Not only precedent, but compelling necessity, support the form of delegation contained in both acts.

E. Reciprocal and Mutual Acceptance of State and Federal Agencies.

The appellant's most serious objection to the New York Act seems to be that it avails itself of the administrative machinery set up under the Federal

Act, instead of establishing a similar machinery of its own. This the appellant regards as complete surrender on the part of the State Government to the President of the United States. The appellant does not point to any constitutional inhibition against this form of legislation unless it be the claim of unconstitutional delegation of powers. It argues as if this effort at cooperation and the use by the State of the Federal administrative machinery were something unheard of and completely novel.

The adoption of federal laws by the states and, in the converse situation, of state laws by the Federal Government has been a more common practice than is generally realized.[2] There have been times in our history when less critical conditions have brought about joint federal and state legislation. There is

---

Footnote 2: *Federal Adoption of State Laws, Present and Future.*

The Federal Government by a series of laws concluding in the Conformity Act, 17 Stat. 197 (1872) (Rev. Stat. Sec. 914, U. S. C. tit. 28 Sec. 724) adopted the laws of procedure of the states as controlling in the Federal courts. Analogous to the Conformity Act is the provision in the Revised Statute (Sec. 788) which provides that marshals of Federal Courts and their deputies shall have in each state "the same powers in executing the laws of the United States, as the sheriffs and their deputies in such state may have, by law, in executing the laws thereof" (U. S. C. tit. 28, Sec. 504). In its bankruptcy legislation it has adopted the exemption and priority provisions of state laws (30 Stat. 548, 563; U. S. tit. 11, Sec. 24, Sec. 104 (b) (5). Other examples of such action by the Federal government are as follows: Purity of elections (Rev. Stat., Sec. 5515); State criminal laws applicable to Federal territories such as Indian reservations and National Parks (35 Stat. 1145, U. S. C. tit. 18, Sec. 468) and (U. S. C. Title 16, Secs. 25, 59, 97, 126, 169, 375, 117b, 198b, 204b); quarantine laws (20 Stat 37, U. S. C. tit. 42, Sec. 86); prohibition of the transportation of goods in interstate commerce when such goods are produced or sold in violation of state laws, the Webb-Kenyon Act (39 Stat. 1058, 1069); the Lacey Act (31 Stat. 188). (U. S. C. tit. 18, Sec. 392); the Federal Migratory Bird Treaty Act (40 Stat. 755, U. S. C. tit. Sec. 705); interstate shipment of black bass (44 Stat. 576, as amended by 46 Stat. 845, U. S. C. tit. 16, Secs. 851-855).

Some of these statutes are examples of the actual adoption of state laws by the Federal Government while others are instances of conditioning the operation of the federal law upon the action of the states. Whether we speak of conditioning the operation of the federal law upon the state law or adopting a state law as a federal law the process is essentially the same since in either case the Federal Government is in effect adding its sanctions to the enforcement of state laws.

obviously no inherent objection to such joint action when the same end is sought by both governments as in the case of the Recovery Acts. As Chief Justice Marshall declared a "spirit of harmony and conciliation * * * ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the States bear to each other." *Gibbons* v. *Ogden*, 9 Wheat. 1, 206. See also *Second Employer's Liability cases*, 223 U. S. 1; *Minneapolis & St. Louis R. R. Co.* v. *Bombolis*, 241 U. S. 211.

Under the Eighteenth Amendment several states passed laws giving state aid to the enforcement of prohibition. The courts have upheld the use of state agencies in aid of federal laws. *Ex parte Burke*, 190 Cal. 326. Counterfeiting federal money has been made a state offense in Ohio. See *Tox* v. *Ohio*, 5 How. 410, 434, in which such legislation has been sustained. States have aided the Federal Government in the exercise of the national power to declare war and raise armies. In *Gilbert* v. *Minnesota*, 254 U. S. 325 and *Halter* v. *Nebraska*, 205 U. S. 34, this type of legislation was held valid and proper.

Conversely the Federal Government has frequently lent its aid to help the policies of the states. In the days of state prohibition laws the Federal Government exercised its powers over interstate commerce to make more effective the enforcement of the state laws, *e. g.*, the Webb-Kenyon and Wilson Acts. See *In re Rahrer*, 140 U. S. 545; *Clark Distilling Co.* v. *Western Maryland Railroad*, 242 U. S. 311. So too Congress has legislated to help the states in dealing with the problems of stolen automobiles. It has invoked its power under the Interstate Commerce Clause to supplement the state police powers. This

has been upheld. See *Brooks* v. *United States*, 267 U. S. 432. This type of cooperative legislation is becoming more frequent as the problems facing the Government become more complex.[3]

Footnote 3: *State Acts Conforming to Federal Laws and Regulations—Present and Future.*

Adoption of Federal laws and regulations, past and future, by the states is scarcely a novel method of securing uniformity. The Eighteenth Amendment vested concurrent powers of enforcement in the federal and state governments. A number of states enacted statutes which adopted the provisions, either in whole or in part, of the National Prohibition Enforcement Act. (See 23 Col. L. Rev. 674 at 676 (1923)); Chamberlain, "Uniformity of Regulatory Laws Through Federal Models" (9 A. B. A. J. 383 at 383-384 (1923).) Again, fourteen states at present have provisions in their statutes authorizing automatic conformity to the federal regulations fixing open seasons under the Federal Migratory Bird Treaty Act. Several of these states also require automatic conformity to federal regulations on bag limits and possessions, and two of them adopted the federal regulations in their entirety. It is interesting to note the wording of the Mississippi Statute which reads as follows:

> "The Federal Migratory Bird Treaty Act and *Regulations* thereunder as presently provided for or as amended from time to time and proclaimed by the President are hereby made a part of this act" (Miss. Code of 1930 (1933 Supp.), Sec. 4705-09).

The South Carolina statute cited reads:

> "The Federal Migratory Bird Treaty *Regulations*, being the supreme law of the land under Article VI of the Constitution of the United States, *are hereby declared to be the law of this State*, and the penalty for their violation shall be punishment of not less than $10.00, nor more than $25.00 fine, or thirty days imprisonment" (1 Code of Laws of S. C. 1932, Sec. 1767).

A number of the states in the enactment of their narcotic laws have adopted some of the standards prescribed by administrative officers under the Federal Narcotic Laws. The Uniform Narcotic Drug Act which provides for the adoption of some federal standards under the Federal Narcotic Legislation has been adopted by Florida, Kentucky, Nevada, New Jersey, Rhode Island, South Carolina and Virginia.

The laws of the following states provides for the automatic adoption and recognition on the part of the state of all definitions and standards promulgated by the Secretary of Agriculture under the Pure Food and Drug Act: Alabama, Arizona, California, Florida, Idaho, Kansas, Maryland, Michigan, Minnesota, Missouri, Mississippi, Nevada, North Carolina, Oklahoma, Utah, Vermont, Virginia and Washington. The remainder of the states in their pure food and drug acts generally authorized the adoption of rules and regulations and provided that when definitions are adopted they shall be in conformity with those adopted for the enforcement of the Federal Act, provided they are not contrary to the state laws. Several states in their warehousing acts require the same license and bond requirements governing warehousemen qualifying under the Federal Warehousing Act. Federal grain standards under the Federal Grain Standards Act have been adopted by the various states and the

The desirability of the adoption and incorporation of present and future laws in the interest of coordination between the State and Federal Governments received full discussion in *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311, *supra.* In that case the Court considered the Webb-Kenyon Act (37 Stat. 699, Chap. 90) which forbade interstate transportation of intoxicants intended to be received, possessed, sold or used in violation of any law of the

---

same is true of Federal vegetable and fruit grading standards. Nearly all of the states of the Union have adopted laws of this type. Some of the oil producing states have provisions in their conservation statutes adopting and making automatically effective the rules and regulations of the Department of the Interior. See (Ely, Oil Conservation Through Interstate Agreement 258 (1933)).

In the field of aviation law there has been a most interesting development: a majority of states require pilots to be licensed and aircraft to be registered in accordance with the Federal regulations concerning these matters, and some have adopted in addition the Federal Air Rules. In 1933 thirty-four states and territories required federal aircraft and airmen licenses for all operations within their borders, eleven required federal licenses for commercial aircraft operations, and four required either federal or state licenses for all aircraft operations (4 Air Commerce Bull. 508-535 (1933) (See, State Adoption and Enforcement of Federal Air Navigation Laws, 16 A. B. A. J. 715 (1930)).

In recent years there have been many examples of federal aid legislation whereby the Federal Government makes grants-in-aid to the states provided the states match the federal grants and accept the terms upon which they are offered. By means of these devices the Federal Government has induced the states to accept federal policies and standards with respect to such matters as forest fire prevention, the organization and training of the militia, agricultural expansion work, the construction and maintenance of improved highways, vocational education, vocational rehabilitation, the organization and maintenance of employment bureaus, the treatment of venereal disease and instruction in the hygiene of maternity and infancy. In all of these cases the states have adopted federal legislative policy and administrative determinations in their efforts to cooperate with the Federal Government. We are now witnessing a very rapid expansion of this and similar types of legislation in connection with old age pensions, unemployment insurance, housing laws, banking acts, mortgage laws, etc.

Not all of the illustrations given above are cases in which the states have imposed a penalty for the same act already penalized under federal laws and regulations. The criminal features are absent in the Federal Aid Legislation and in some of the other illustrations given. The states were adopting, as a rule of conduct for those engaged in intrastate commerce, federal policies and standards, the violation of which was a federal crime when committed within the state by those engaged in interstate commerce. The illustrations support a general practice of adoption by the states of federal legislative policies and application of federal administrative standards.

state of destination. The opinion in that case contains the following language:

P. 326:

> "The argument as to delegation to the states rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply. In fact, the contention previously made, that the prohibitions of the state law were not applicable to the extent that they were broader than the Webb-Kenyon Act, is in direct conflict with the proposition as to delegation now made.
>
> So far as uniformity is concerned, there is no question that the act uniformly applies to the conditions which call its provisions into play,—that its provisions apply to all the states,—so that the question really is a complaint as to the want of uniform existence of things to which the act applies, and not to an absence of uniformity in the act itself."

P. 330:

> "And that Congress had the right to enact this legislation making existing and future state prohibitions applicable was the express result of the decided cases to which we have referred, beginning with *Re Rahrer,* 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865."

P. 331:

> "Or, in other words, stating the necessary

result of the argument from a concrete consideration of the particular subject here involved, that because Congress, in adopting a regulation, had considered the nature and character of our dual system of government, state and nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce co-operation between the local and national forces of government to the end of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution."

While *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, is not applicable because the decision was based upon the duty of Congress to retain exclusive jurisdiction over maritime affairs, the dissenting opinion of Justice Holmes in that case is pertinent (p. 169):

"I thought that *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311, 61 L. ed. 326, L. R. A. 1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845, went pretty far in justifying the adoption of state legislation in advance, as I cannot for a moment believe that, apart from the 18th Amendment, special constitutional principles exist against strong drink. The fathers of the Constitution, so far as I know, approved it. But I can see no constitutional objection to such an adoption in this case if the act of Congress be given that effect. I assume that Congress could not delegate to state legislatures the simple power to decide what the law of the United States should be in that district. But when institutions are established for ends within the power of the states, and not for any purpose of affecting the law of the United States, I take

it to be an admitted power of Congress to provide that the law of the United States shall conform as nearly as may be to what, for the time being, exists. A familiar example is the law directing the common-law practice, etc., in the district courts, to 'conform, as near as may be, to the practice, etc., existing at the time' in the state courts. Rev. Stat. §914, Comp. Stat. §1537, 6 Fed. Stat. Anno. 2d ed., p. 21. This was held by the unanimous court to be binding in *Amy* v. *Watertown,* 130 U. S. 301, 32 L. ed. 946, 9 Sup. Ct. Rep. 530. See *Gibbons* v. *Ogden,* 9 Wheat. I, 207, 208, 6 L. ed. 23, 72, 73; *Cooley* v. *Port Wardens,* 12 How. 299, 317, 318, 13 L. ed. 996, 1004. I have mentioned the scope given to the saving of a common-law remedy, and have referred to cases on the statutes adopting state pilotage laws. Other instances are to be found in the acts of Congress, but these are enough. I think that the same principle applies here. It should be observed that the objection now dealt with is the only one peculiar to the adoption of local law in advance. That of want of uniformity applies equally to the adoption of the laws in force in 1917."

See also *U. S.* v. *Hill,* 248 U. S. 420, upholding the Reed Amendment to the Webb-Kenyon Act.

The reason behind this method of law making is "uniformity" of regulation and coordination of the activities between Federal and State Governments in dealing with the serious and complex problems of modern society. The cases just discussed lay down the principle that there is no inherent objection to this method of cooperation.[4]

This reasoning is even more effective in the case

Footnote 4: See article by Charles A. Beard, 25 Political Science Review, page 61.

of state legislation subjecting intrastate transactions to the laws and regulations of the United States applicable in interstate commerce. Uniformity is more likely through cooperation of the states to the one single Federal standard than by virtue of uniformity of Federal law to numerous state laws.

The question of using Federal administrative agencies to carry out the legislative purposes of the state seems entirely unobjectionable. This Court has on several occasions sustained the use of state agencies for the administration of Federal legislation. (See *Holmgren* v. *U. S.*, 217 U. S. 509.) In *Arver* v. *U. S.*, 245 U. S. 366, at 389 this Court summarily dismissed as "too wanting in merit to require further notice", the contention that an act was void because it delegated to state officials federal power. As already shown it has for reasons of practical necessity become a common practice for the states to enlist the aid of Federal administrative agencies in the enforcement of their own laws and in prescribing the rules or regulations to make these laws effective. See, for example, Chap. 233 of the Laws of N. Y. of 1928, which in effect, designated the Federal Government as the agency to prescribe rules to govern the granting of licenses to aviators in "intra state flying". This type of legislation was recently sustained in *Swetland* v. *Curtis Airports*, 41 Fed. (2nd) 929, injunction modified 55 Fed. (2nd) 201. In that case the Court said (p. 939):

> "The act manifests an intention on the part of the Legislature to take advantage of the extensive administrative machinery which had been established by the Department of Commerce under the enabling provisions of the Air Commerce Act of 1926."

See also *Watkinson* v. *Hotel Pennsylvania,* 195 App. Div. 624, aff'd 231 N. Y. 562, where the Legislature accepted the provisions of any law of the United States making appropriations to be apportioned among the states for vocational rehabilitation of disabled persons.

Further support for the method of legislation here adopted is to be found in tax statutes which ascertain the charges to be made on the basis of variable foreign legislation. This type of legislation has been regularly sustained on the theory that the Legislature has not surrendered its power, but simply has chosen the alien statute as a point of reference to secure convenient flexibility.

Florida v. *Mellon,* 273 U. S. 12 (federal statute allowing credit on federal estate tax for estate taxes paid under state law).

People v. *Goldfogel,* 242 N. Y. 277 (property tax based on amount of moneyed capital of private banks in competition with national banks).

Home Ins. Co. v. *Swegert,* 104 Ill. 653 (retaliatory tax statute on foreign corporations to equalize local tax with that of other states).

Underwood Typewriter v. *Chamberlain,* 94 Conn. 47 (corporate tax of 2% of net income on which corporations pay tax to U. S. [affd. 254 U. S. 113]).

Hagood v. *Doughton,* 195 N. C. 811 (estate tax equal to the full percentage of federal estate tax allowed as credit of the Federal Government for payment of tax to state).

Brown v. *State,* 323 Mo. 138 (estate tax equal to full percentage of Fed. estate tax allowed as a credit by Federal Government for payment of tax to state).

Phoenix Ins. Co. v. *Welch*, 29 Kan. 672 and

People v. *The Fire Assn. of Phila.*, 92 N. Y. 311, affd. 119 U. S. 110 (retaliatory tax statute).

Texas Co. v. *Diehinson*, 79 N. J. L. 292 (foreign corporation retaliatory taxes).

In *People* v. *The Fire Assn. of Phila.* the New York Court of Appeals said (p. 322):

> "A law may be made to fit a changing event, and follow it, and adjust itself to it, through a series of future mutations, and those, too made by foreign legislation, or the voluntary action of other bodies."

It is extremely questionable whether these cases which refer to tax statutes and ascertainment of amounts payable to the State or Federal Government can be differentiated from any other broad adoption of the laws or regulations of a state or the Federal Government. Reasonableness, convenience and economy have been used as arguments in these cases. The same compelling reasons exist for legislation in the form of the State Act.

The New York legislation finds additional substantial support in the authorities which permit varying degrees of delegation to private or non-governmental groups.[5]

Footnote 5:

Nicchia v. *N. Y.*, 254 U. S. 228;
Fox v. *Mohawk & H. River Humane Soc.*, 165 N. Y. 517;
People v. *Griswold*, 213 N. Y. 92;
Grannan v. *Westchester Racing Co.*, 153 N. Y. 449;
American S. P. C. A. v. *City of N. Y.*, 205 App. Div. 335;
Champlain Refining Co. v. *Corp. Commission of Okla.*, 286 U. S. 210;
Eubank v. *Richmond*, 226 U. S. 137;

and see discussion and collection of cases in 32 Columbia L. R. 80.

Certainly the State should be as free to delegate the administration of its laws to Federal administrative authorities as to private groups.

In *Gima* v. *Hudson Coal Co.*, 310 Pa. 480, the state Anthracite Mine Law provided that when mine explosives were used the manner of storing, keeping and moving the same should be in accordance with special rules furnished by the manufacturers. It was contended that this constituted an unlawful delegation of legislative power to private persons. In dismissing the contention the Supreme Court of Pennsylvania said:

> "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. *To deny this would be to stop the wheels of government.*" (Italics ours.)

The theory adopted by the New York Act is the only practical method which could bring about the intention of the Legislature as expressed in the statute. Just as it would have been impossible for Congress to have performed the duties conferred upon the President by the National Act, it was likewise impossible that the Legislature of this State would have achieved the purposes set forth in its law without the use of the Federal administrative machinery. The establishment of a complete administrative organization by the State of New York which would in every respect parallel the National Recovery Act would have been a duplication of organization, officers and expense and have constituted sheer waste. Moreover, uniformity in standards would have been impossible.

If appellant's argument be sound, it would be virtually impossible for the Legislature to achieve the object of the statute. The machinery set up under this Act was the only feasible method of accomplishing the purpose. To have restricted the Legislature to the adoption of only those codes in existence at the time of the passage of the statute would have required new legislation with each succeeding code or regulation, or would have meant the limitation of such aid and cooperation within a closely restricted sphere of industrial activity. Confusion, inefficiency and waste would have resulted. The very important element of flexibility so essential in this code making process, would have been sacrificed. The broad program sought to be accomplished would not possibly have functioned if the Legislature had to pass a new law upon the adoption of every new code or every amendment thereto.

It is concluded by the respondent that the State of New York has an inherent right to coordinate its laws and policy with that of the National Government by making a blanket adoption of the administrative acts, pursuant to the National Industrial Recovery act. The emergency conditions described in another part of this brief merely land reason and necessity to this form of legislation.

In view of the fact that approximately 600 codes were formulated under the President's guidance, pursuant to the National Industrial Recovery Act, the form of the State Act appears to be the only feasible method for making the State's economic edicts within the state conform with those in interstate transactions and in interstate commerce generally.

Quite apart from the direct right of a legislature, under circumstances such as these, to harmonize its

activities with the already supreme law of the land, according to the theory that has its basis in Justice Holmes' dissenting opinion in *Knickerbocker Ice Co.* v. *Stewart, supra,* it is clear that the Legislature of the State of New York had the privilege of delegating certain of its duties to the President of the United States and that this was done with due regard for the proper restrictions that exist upon the right of the Legislature so to do.

The appellant's brief characterizes the New York Act as "a penal statute" and contends that it is violative of the State Constitution in that it delegates the power to create a crime. Great stress is placed upon the fact that the rule or regulation was not in existence at the time when the criminal penalty was prescribed in the Act. We believe that the Court will sustain the State's position that the statute contains adequate standards, and that the State may properly delegate power to the Federal Administration. Having reached that conclusion, no difficulty will be found with this last argument of the appellant.

The real problem is whether there is a proper delegation of legislative power to the administrative agency to make the rules and regulations. Obviously, if the Legislature sets a standard and delegates power to an agency to realize that standard through action of its own, the rules to be adopted by the agency to achieve the standard set by the Legislature cannot be in existence at the time of the enactment of the statute. As a matter of absolute necessity, such rules and regulations must come into existence at a time subsequent to the making of the law.

If the objection of the appellant is sound, the Legislature would first be required to set a standard and delegate its power to an agency, the agency would

then adopt rules to attain the standard and the legislature would then be required to prescribe a criminal penalty for the violation of those rules. The great objection to this course of proceeding is that where the legislature delegates power to an administrative agency it usually does so because the subject involved in the delegation is one which requires continuous attention and the standard set by the legislature can be attained only by a succession of rules and regulations. If a criminal penalty could be attached to the violation of each rule and regulation only after its adoption, one of the main purposes for the original delegation of power would be defeated.

The legislature provides for this situation by enacting in the original law that a violation of any rule or regulation adopted by its agent shall be a crime and this procedure has become so usual that it excites no comment.

The whole question of the power of the legislature to enact laws to come into effect upon the happening of some future event is well summed up by the Court of Appeals in the case of *People* v. *Fire Association of Philadelphia*, cited *supra*. There the court stated at page 319 of its opinion:

> "* * * Most laws are made to meet future facts. * * * Such contingency may sometimes be, instead of a certain and definite fact, one which is variable and changeable. The legislation suited to such a fact and adapted to such a future emergency may properly recognize its movable character, and be itself made flexible to the changing emergency, and this very characteristic is the product of legislative will and discretion rather than a surrender of it."

Numerous authorities sustain convictions for violations of rules and regulations made by administrative agencies to which legislative power had been properly delegated. *U. S.* v. *Grimaud*, 220 U. S. 506; *Avent* v. *U. S.*, 266 U. S. 127; *Nebbia* v. *People of State of N. Y.* (*supra*); *People* v. *L. I. R. R. Co.*, 134 N. Y. 506; *People* v. *Dempsey*, 224 N. Y. 140; *Polinsky* v. *People*, 73 N. Y. 65. The contention that by reason of the penalties provided in the act itself the codes are "penal statutes" is, therefore, unsound.

Inasmuch as the National Recovery Administration has encouraged the states to enact cooperative recovery acts, it cannot be objected that Congress intended to occupy the entire field to the exclusion of state action (see Sec. 2 (a) of National Industrial Recovery Act; *Clark Distilling Co.* v. *Western Maryland R. R. Co.*, 242 U. S. 311; *Mintz* v. *Baldwin*, 289 U. S. 346; and see 34 Columbia Law Review 1077, 1080-1081).

F. Section 17, Article III of the State Constitution.

A further technical objection made by appellant is that the State Act violates Article III, Section 17 of the State Constitution, which provides as follows:

> "No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act."

The Code which is made enforceable under Section 2 of the State Act is not an "existing law". There is no incorporation of the National Industrial

Recovery Act, as indeed there cannot be as it refers to interstate commerce whereas the State Act specifically limits its own terms to intrastate matters. The term "existing law" appears to have no application to enactments of bodies other than the New York Legislature. *Watkinson* v. *Hotel Pennsylvania,* 195 App. Div. 624, 231 N. Y. 562, and *People* v. *Davis,* 78 App. Div. 570.

In *Watkinson* v. *Hotel Pennsylvania, supra,* the court had before it "an act to accept the provisions of *any* law of the United States making an appropriation to the states for the rehabilitation of physically handicapped persons * * *," and it provided, among other things, that "the State of New York, through its legislative authority: (1) *accepts the provisions of any law of the United States* making appropriation to be apportioned among the states for vocational rehabilitation of disabled persons; (2) empowers (a certain designated board) to cooperate with such agency as the Federal Government shall designate to carry out the purpose of such law" (3) directs the payment of money to be received from the United States *"in the manner provided by such act"* (of Congress) for the purposes therein specified.

The Appellate Division for the Third Department held, and the Court of Appeals unanimously affirmed, that the statute was not repugnant to either Sections 1 or 17 of Article III of the Constitution.

In *People* v. *Davis,* 78 App. Div. 570, it was held that an act of the Legislature that the "Sanitary Code in the City of New York" shall be "deemed in full force and operative in the City of New York" and other similar legislation with respect to the same Sanitary Code did not violate the above mentioned constitutional provision because

> "the Sanitary Code, when declared to be binding and in force was not an existing law of the state within the meaning of that section of the Constitution, * * *" (at p. 576).

Section 17 of Article III has been given a very limited application by the New York Constitution. "It is obvious that it does not apply to an act purporting to amend existing laws * * *." (*People ex rel. N. Y. Electric Lines* v. *Squire*, 107 N. Y. 593, 602); it has been held that acts which provide for better means of carrying out, or for the enforcement, of previously enacted statutes, need not incorporate the previous statutes and, further, that previous statutes may be made applicable, merely by reference, for the purpose of providing means and methods of carrying out a new law (*People ex rel. Emerson* v. *Lorillard*, 135 N. Y. 285; *People ex rel. Commissioners* v. *Banks*, 67 N. Y. 568.

In *People ex rel. N. Y. Electric Lines* v. *Squire*, *supra*, the Court said (p. 602):

> "The object and intent of the constitutional provision was to prevent statute law relating to one subject from being made applicable to laws based upon another subject, through ignorance and misapprehension on the part of the legislature and to require that all acts shall contain within themselves such information as should be necessary to enable it to act upon them intelligently and discreetly."

The National Industrial Recovery Act is not a law "based upon another subject" from that contained in the State Recovery Act. The latter Act contains within itself all "information" necessary to have enabled the legislature to act "intelligently and

discreetly". No doubt of the subject matter of the National Act could have existed. The identity of the subject and full knowledge on the part of the legislature regarding it is clearly expressed.

Conclusion.

Contending, as we do, that Chapter 781 of the Laws of 1933 of the State of New York was correct in conception and form, was within every requirement of the State Constitution as to its content and purpose and the method adopted to fulfill the same, and that the sovereign powers of the State in the premises have not been exceeded but in fact and law have not nearly thereby approached their limit, we feel justified in respectfully urging that this Honorable Court will find that said Chapter 781 of the Laws of 1933 is a valid and constitutional law in all respects and this we ask without recourse to any plea of sentiment or reference to the consequences of an adverse ruling, but solely upon well founded constitutional grounds.

JOHN J. BENNETT, JR.,
Attorney General,
New York State,

HENRY EPSTEIN,
Solicitor General,
New York State,

Solicitors.

HENRY EPSTEIN,
EUGENE F. ROTH,
BURTON A. ZORN,
Of Counsel.

Appendix A.

CHAPTER 781.

AN ACT to provide for codes of fair competition for trades, industries and subdivisions thereof, agreements, licenses, rules and regulations pursuant to the provisions of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred thirty-three, as affecting intrastate commerce within the state

Became a law August 26, 1933, with the approval of the Governor. Passed, on message of necessity, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. **Legislative finding; statement of policy.** A national emergency productive of widespread unemployment and disorganization of industry, which likewise prevails in the state of New York, which burdens intrastate, interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people and of the people of the state of New York, is hereby declared to exist. The existence in this state of such present acute economic emergency, and the effects and certain causes thereof as declared in section one of title one of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred thirty-three, are hereby recognized; and it is hereby declared that said emergency, the causes and effects thereof, as so declared, relate as well to commerce in this state wholly intra-

state in character as to interstate and foreign commerce and transactions affecting interstate and foreign commerce carried on in this state. It is hereby declared to be the policy of this state to cooperate in the furtherance of the objects and purposes declared in said act of the congress, and each and every provision of this act shall be construed in accordance with the policy so declared, and to make uniform the standards of fair competition prevailing in intrastate commerce and industry with those of interstate commerce required by the provisions of the said national industrial recovery act which are applicable in interstate commerce in the state of New York.

Section 2. **Filing of codes and agreements.** 1. The secretary of state is hereby authorized to receive for filing and shall file in the office of the department of state a copy of each code, agreement, license, rule or regulation in effect pursuant to such act of the congress, pertaining, affecting or in any way relating to the conduct of business in the state and duly certified as a true copy of such document or documents by the officials in charge of the administration of the provisions of title one of the said national industrial recovery act or by their duly authorized agent. Upon such filing of a copy so certified of a code of fair competition for any trade, industry or subdivision thereof, as approved by the president of the United States, or of any agreement or license or of any rule or regulation provided for under title one of the said national industrial recovery act, such code, agreement, license, rule or regulation shall be the standard of fair competition for such trade or industry or subdivision thereof in the state as to transactions intrastate in character, and any violation of any provision of such code, agreement, license, rule or regulation

shall be a misdemeanor, and upon conviction thereof, the person convicted shall be fined not more than five hundred dollars for each offense, and for each day such violation continues a separate offense subject to the fine herein prescribed shall be deemed to have been committed.

2. The secretary of state shall cause to be printed a sufficient number of copies of each such code, agreement, license, rule or regulation and the same shall be kept available for distribution upon request therefor.

3. If in any such code, agreement, license, rule or regulation, power is conferred upon any person or group of persons to subpoena witnesses, compel the production of books, papers and records, the attendance of witnesses or to take their testimony, a like power shall be deemed to have vested in such person or group of persons with regard to matters and things of a wholly intrastate character.

Section 3. **Jurisdiction of court.** The supreme court of the state of New York, is hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition, agreement, license, rule or regulation, filed pursuant to this act, and to prevent and restrain the commission within this state of any act tending to defeat or hamper the operation and effectiveness, within the state, of such act of the congress at the instance of any party whose interests are or may be adversely affected by such violations or acts. Nothing in this section contained, however, shall in any wise affect the criminal liability for violations of such codes, agreements, licenses, rules or regulations. Provided, however, that nothing in this act shall be construed by any public official or court

as declaring illegal the right of workers to organize; to adopt a constitution and by-laws and enforce the same and the right to control and direct the members of such organization in accordance with such constitution and by-laws; that no provision of this act shall be construed to compel workers or employees to continue at their work; or to declare an act illegal of an organization to collectively cease work, or its officers directing the cessation of work of its members.

Section 4. **Products of individual labor.** Nothing in this act shall prevent an individual from pursuing the vocation of manual labor and selling or trading the products thereof; nor shall anything in this act prevent anyone from marketing or trading the produce of his farm.

Section 5. **Exemption from anti-trust laws; application of labor laws.** While this act is in effect and for sixty days thereafter, any code, agreement, license, rule or regulation in effect under this act, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of article twenty-two of the general business law, or of any other provisions of law, to the extent that such provisions of law are inconsistent with the provisions of such code, agreement, license, rule or regulation. Nothing in this act contained, however, shall be construed in any way to alter, modify or affect the provisions of existing laws of this state in such manner as to permit any change in public utility rates except with the permission and approval of the public service commission or as to lower the standards therein provided with regard to labor, hours of labor, wages for labor and employment of females and children.

Section 6. **Effect of the issuance, suspension or revocation of licenses.** 1. The license required of and obtained by any person pursuant to paragraph (b) of section four of said act of the congress shall be deemed to include business engaged in or carried on by him of a wholly intrastate character, and with respect thereto such person shall be subject to all the terms and conditions expressed therein and shall be entitled to all the privileges and immunities granted thereby.

2. The failure to obtain such a license or the suspension or revocation by the president of the United States of any such license shall preclude such person from engaging in or carrying on any business of a wholly intrastate character.

3. Any person who engages in or carries on any business in this state in violation of subdivision two of this section shall, upon conviction thereof, be fined not more than five hundred dollars and for each day such violation continues a separate offense, subject to the fine herein prescribed, shall be deemed to have been committed.

Section 7. **Letting of public contracts.** Every department, board, bureau, agency, authority, commission, public body or officer of the state or of any political subdivision thereof or district therein charged with the duty of letting or awarding contracts for (a) the construction, alteration or repair of public works or (b) the purchasing of materials or supplies, shall, notwithstanding any inconsistent provision of law, let or award such contracts only to such persons or corporations, otherwise qualified, who or which will agree in and by the terms of such contract to use or supply only articles, materials and supplies which

have been or will be mined, produced, manufactured or supplied, as the case may be, by a person or corporation who or which is a party or subject to a code of fair competition, agreement or license, approved, prescribed or issued under the said national industrial recovery act for the trade, industry or subdivision thereof mining, producing, manufacturing or supplying such articles, materials or supplies.

Section 8. **Duration.** This act, in so far as it affects agreements, codes, rules or regulations, shall become ineffective contemporaneously with the expiration of said national industrial recovery act, provided for by section two (c) of said act, and in so far as it affects licenses, contemporaneously with the expiration of the said national industrial recovery act, as provided for in section four (b) of said act.

Section 9. **Effect of partial invalidity.** If any provision of this act or the application thereof to any person or circumstance is held invalid, the remainder of this act, and the application of the provisions thereof to other persons or circumstances, shall not be affected thereby.

Section 10. This act shall take effect immediately.

Appendix B.

CHAPTER 783.

AN ACT providing for the granting by the state of its consent to the president to utilize state and local officers and employees, pursuant to the provisions of the national industrial recovery act, enacted

by the Congress of the United States on June thirteenth, nineteen hundred and thirty-three

Became a law August 26, 1933, with the approval of the Governor. Passed three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The state hereby consents to the exercise of the power and authority vested in the president, pursuant to the provisions of title one, section two (a), and of title two, section two hundred and one (a) of the national industrial recovery act, enacted by the congress of the United States on June thirteen, nineteen hundred and thirty-three, to utilize, with the written consent of the governor, such state and local officers and employees as the president may find necessary and to prescribe their authorities, duties, responsibilities and tenure. The consent of the state hereby granted shall cease and terminate when such respective titles of the said national industrial recovery act shall cease to be in effect.

§2. This act shall take effect immediately.